

ENTER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

O

HERMIE B. ROTEA, aka HERMIE)	Case No. CV 06-2238-RC
BORRES ROTEA,)	
)	
Plaintiff,)	
)	
vs.)	OPINION AND ORDER
)	
SOCIAL SECURITY ADMINISTRATION))	
STEPHEN BREEN, DOES 1-10,)	
INCLUSIVE,)	
)	
Defendants.)	
_____)	

On April 19, 2005, plaintiff Hermie B. Rotea, aka Hermie Borres Rotea, proceeding pro se, filed a complaint challenging the Social Security Administration's ("SSA") determination he had been overpaid old age benefits and the subsequent recoupment of the overpayment by the withholding of his retirement benefits and the garnishment of his wages by SSA. Plaintiff alleges the SSA's actions constitute age discrimination, fraud, misconduct, negligence, and violate his constitutional rights, and he seeks a refund of the monies withheld and garnished, with interest, damages, injunctive relief, and an accounting. On July 18, 2006, defendants filed a motion to dismiss

1 the complaint for lack of subject matter jurisdiction, and on
 2 September 21, 2006, plaintiff filed an opposition to the motion to
 3 dismiss. On September 1, 2006, plaintiff filed an amended opposition
 4 to the motion to dismiss.

6 **BACKGROUND**

7 On April 15, 1992, when plaintiff was 62 years old, he applied
 8 for and was granted retirement insurance benefits under Title II of
 9 the Social Security Act ("the Act"). Declaration of Rose Ray, ¶
 10 3(a).¹ Subsequently, on March 3, 1998, plaintiff applied for and was
 11 granted Supplemental Security Income ("SSI") benefits under Title XVI
 12 of the Act.² Id. In June 2000, SSA found it had overpaid plaintiff
 13 SSI benefits in the amount of \$10,685.20 and began withholding \$25.00
 14 a month from plaintiff's Title II retirement benefits. Id., Exh. 1.
 15 The plaintiff does not challenge these actions.

16
 17 However, on November 1, 2005, SSA determined it had also overpaid
 18 plaintiff SSI benefits in the amount of \$6,201.00 and would withhold

19
 20 ¹ The Court notes that Ms. Ray has not authenticated any of
 21 the documents attached to her declaration. However, since
 22 plaintiff does not dispute the authenticity of these documents,
 the Court will consider them to be competent evidence.

23 ² "The [SSI] program . . . provides cash payments to aged,
 24 blind, and disabled Americans for the purpose of ensuring that
 they have 'at least a subsistence level income.'" Newman v.
 25 Apfel, 223 F.3d 937, 938 (9th Cir. 2000) (citation omitted);
Whaley v. Schweiker, 663 F.2d 871, 873 (9th Cir. 1981). Thus,
 26 SSI benefits are available only to aged, blind or disabled
 persons who have very limited income and resources which do not
 27 exceed a certain level. 20 C.F.R. § 416.1100; Higbee v.
Sullivan, 975 F.2d 558, 563 (9th Cir. 1992) (per curiam);
 28 Cervantez v. Sullivan, 963 F.2d 229, 231 (9th Cir. 1992).

1 plaintiff's Title II retirement benefits between November 2005 and
2 July 2006 to recover the overpayment. Ray Decl., ¶ 3(b), Exh. 2.³ In
3 furtherance of this determination, on November 23, 2005, SSA advised
4 plaintiff that "[t]he next check [he would] receive will be for
5 \$447.00, which is the money you are due through July 2006." Id., Exh.
6 3. In this notice, SSA also advised plaintiff he had a right to
7 appeal the overpayment and recoupment decision:

8
9 If you disagree with this decision, you have the right to
10 appeal. We will review your case and consider any new facts
11 you have. A person who did not make the first decision will
12 decide your case. We will correct any mistakes. We will
13 review those parts of the decision which you believe are
14 wrong and will look at any new facts you have. We may also
15 review those parts which you believe are correct and may
16 make them unfavorable or less favorable to you.

17
18 Id. In response, on December 7, 2005, plaintiff filed a request for
19 reconsideration of SSA's overpayment and recoupment decision; however,
20 SSA has not yet ruled on this request. Complaint, Exhs. G-G1; Ray
21 Decl., ¶ 3(c), Exh. 4. Finally, on April 3, 2006, SSA advised
22 plaintiff it was "withholding all of [his] monthly benefits beginning
23 April 2006 to recover an overpayment[,]" and plaintiff would "receive
24 \$729.50 for August 2006 around September 1, 2006." Ray Decl., ¶ 3(d),
25 Exh. 5.

26
27 ³ This overpayment was caused by plaintiff working between
28 October 20, 2003, and January 13, 2006. See Complaint, Exhs. E,
F-1, K-1-K-11.

DISCUSSION

I

A federal court may dismiss a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). “In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” Safe Air for Everyone, 373 F.3d at 1039; Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

When a motion to dismiss constitutes a “factual attack” on federal jurisdiction, “the district court is not confined to the four corners of the complaint – it may consider facts and need *not* assume the truthfulness of the complaint[,]” and the existence of disputed material facts will not preclude the court from evaluating the existence of subject matter jurisdiction. Americopters, LLC v. Fed. Aviation Admin., 441 F.3d 726, 732 n.4 (9th Cir. 2006) (emphasis in original); Safe Air for Everyone, 373 F.3d at 1039; White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). When, as here, subject matter jurisdiction is challenged in a motion to dismiss, the plaintiff has the burden of proving jurisdiction. Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam);

1 Ashoff v. City of Ukiah, 130 F.3d 409, 410 (9th Cir. 1997).

2
3 "Federal courts are not courts of general jurisdiction; they have
4 only the power that is authorized by Article III of the Constitution
5 and the statutes enacted by Congress pursuant thereto." Bender v.
6 Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326,
7 1331, 89 L. Ed. 2d 501 (1986); Kokkonen v. Guardian Life Ins. Co. of
8 America, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391
9 (1994); Bacon v. Sullivan, 969 F.2d 1517, 1519 (3d Cir. 1992);
10 O'Connell v. Chater, 958 F. Supp. 466, 467 (C.D. Cal. 1996). Congress
11 may prescribe the procedures and conditions under which the federal
12 courts may review administrative decisions. City of Tacoma v.
13 Taxpayers of Tacoma, 357 U.S. 320, 336, 78 S. Ct. 1209, 1218, 2 L. Ed.
14 2d 1345 (1958); Bacon, 969 F.2d at 1519; O'Connell, 958 F. Supp. at
15 467.

16
17 Furthermore, "[u]nder settled principles of sovereign immunity,
18 the United States, as sovereign, is immune from suit save as it
19 consents to be sued . . . and the terms of its consent to be sued in
20 any court define that court's jurisdiction to entertain suit." United
21 States v. Dalm, 494 U.S. 596, 608, 110 S. Ct. 1361, 1368, 108 L. Ed.
22 2d 548 (1990) (citations and internal quotation marks omitted);
23 Hercules, Inc. v. United States, 516 U.S. 417, 422, 116 S. Ct. 981,
24 985, 134 L. Ed. 2d 47 (1996). "Where sovereign immunity is waived,
25 any suit must comply with the terms of the statutory waiver of
26 immunity." Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir.
27 1982) (citing United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct.
28 767, 769, 85 L. Ed 1058 (1941)).

1 Congress has expressly provided the limited circumstances under
 2 which an individual may bring suit against the Social Security
 3 Administration, as follows:

4
 5 Any individual, after any final decision of the Commissioner
 6 of Social Security made after a hearing to which he was a
 7 party, . . . may obtain a review of such decision by a civil
 8 action commenced within sixty days after the mailing to him
 9 of notice of such decision or within such further time as
 10 the Commissioner of Social Security may allow.

11
 12 42 U.S.C. § 405(g).⁴ This provision is the sole jurisdictional basis
 13 for judicial review of any claim arising under the Act. 42 U.S.C. §
 14 405(h).⁵

15 //

16 //

17
 18 ⁴ Section "405(g) applies to judicial review under both
 19 Title II and Title XVI." Kildare v. Saenz, 325 F.3d 1078, 1081
 n.1 (9th Cir. 2003).

20 ⁵ 42 U.S.C. § 405(h) provides:

21 The findings and decision of the Commissioner of Social
 22 Security after a hearing shall be binding upon all
 23 individuals who were parties to such hearing. No
 24 findings of fact or decision of the Commissioner of
 25 Social Security shall be reviewed by any person,
 26 tribunal, or governmental agency except as herein
 27 provided. **No action against the United States, the
 Commissioner of Social Security, or any officer or
 employee thereof shall be brought under section 1331 or
 1346 of Title 28 to recover on any claim arising under
 this subchapter.**

28 (emphasis added).

1 Section 405(g) "clearly limits judicial review to a particular
 2 type of agency action, a 'final decision of the [Commissioner] made
 3 after a hearing.'" ⁶ Califano v. Sanders, 430 U.S. 99, 108, 97 S. Ct.
 4 980, 986, 51 L. Ed. 2d 192 (1977); Subia v. Comm'r of Soc. Sec., 264
 5 F.3d 899, 902 (9th Cir. 2001); Udd v. Massanari, 245 F.3d 1096, 1098
 6 (9th Cir. 2001). A final judgment consists of two elements:

7
 8 [1] the presentment of a claim to the [Commissioner] and [2]
 9 the exhaustion of administrative remedies. The presentment
 10 requirement is jurisdictional, and therefore cannot be
 11 waived by the [Commissioner] or the courts. The exhaustion
 12 requirement . . . is not jurisdictional, and thus, is
 13 waivable by either the [Commissioner] or the courts.

14
 15 Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1992); Mathews v.
 16 Eldridge, 424 U.S. 319, 328, 96 S. Ct. 893, 899, 47 L. Ed. 2d 18
 17 (1976); Kaiser v. Blue Cross, 347 F.3d 1107, 1115 (9th Cir. 2003).

18
 19 ⁶ Initially, the Commissioner is correct that this Court
 20 has no jurisdiction to review her decision to garnish plaintiff's
 21 wages since such an action is not a "final decision" within the
 22 meaning of Section 405(g). See 20 C.F.R. § 416.1403(a) (20)
 23 ("Administrative actions that are not initial determinations may
 24 be reviewed by us, but they are not subject to the administrative
 25 review process provided by this subpart and they are not subject
 26 to judicial review. These actions include, but are not limited,
 27 to an action about . . . [d]etermining whether we will order your
 28 employer to withhold from your disposable pay to collect an
 overpayment you received under [SSI]."); Matlock v. Sullivan, 908
 F.2d 492, 493 (9th Cir. 1990) ("The [Social Security] Act does
 not define 'final decision' and 'its meaning is left to the
 [Commissioner] to flesh out by regulation.' The regulations
 define reviewable 'final decisions' as decisions by the Appeals
 Council either reviewing or denying review of an ALJ decision."
 (citations and footnote omitted)).

1 The Commissioner contends plaintiff has not exhausted his
2 administrative remedies regarding the recoupment of his overpayment,
3 and plaintiff concedes this is correct. See Complaint at 5:18-6:6:12.
4 Indeed, Social Security regulations prescribe a three-step process for
5 exhausting administrative remedies when a claimant challenges an
6 initial determination of an overpayment of benefits or that the
7 overpayment must be repaid: (1) If a claimant is dissatisfied with an
8 initial decision, he may file a request for reconsideration of the
9 decision within 60 days from receipt of the initial notice unless
10 "good cause" is shown for extending the deadline; (2) if the request
11 for reconsideration is denied, the claimant may request a hearing
12 before an administrative law judge within 60 days from receipt of the
13 notice of the reconsideration determination or decision unless "good
14 cause" is shown for extending the deadline; and (3) if the claimant is
15 dissatisfied with the administrative law judge's decision, he may
16 request the Appeals Council review the decision within 60 days from
17 receipt of the administrative law judge's decision or dismissal of the
18 matter unless good cause is shown to extend the deadline. See, e.g.,
19 20 C.F.R. §§ 416.1400(a), 416.1402(c), 416.1409-416.1411, 416.1433,
20 416.1467-1468.

21
22 Here, the notice dated November 23, 2005, that informed plaintiff
23 SSA was going to withhold his retirement benefits to recoup the SSI
24 overpayment, was an initial determination within the meaning of SSA's
25 regulations, and plaintiff timely sought reconsideration of this
26 decision. However, plaintiff filed this federal court action before
27 SSA had acted upon his request for reconsideration, and without first
28 seeking a hearing before an administrative law judge or Appeals

1 Council review, Complaint, Exhs. G-G1; Ray Decl., ¶ 3(c), Exh. 4;
2 therefore, plaintiff has not exhausted his administrative remedies.
3 See Bowen v. New York, 476 U.S. 467, 482, 106 S. Ct. 2022, 2031, 90 L.
4 Ed .2d 462 (1986) ("To obtain a final decision from the [Commissioner]
5 a claimant is required to exhaust his administrative remedies by
6 proceeding through all three stages of the administrative appeals
7 process. Only a claimant who proceeds through all three stages
8 receives a final decision from the [Commissioner]."); Bass v. Soc.
9 Sec. Admin., 872 F.2d 832, 833 (9th Cir. 1989) (per curiam) (claimant
10 challenging overpayment failed to exhaust administrative remedies when
11 claimant "failed to request . . . a hearing before an administrative
12 law judge, or review by the appeals council").

13
14 Although the Commissioner may waive exhaustion of administrative
15 remedies, Bass, 872 F.2d at 833, she has not done so here. Neverthe-
16 less, this Court may determine that judicial waiver of the administra-
17 tive remedies exhaustion requirement is appropriate. Cassim v. Bowen,
18 824 F.2d 791, 795 (9th Cir. 1987). To determine whether a particular
19 case merits judicial waiver of the administrative remedies exhaustion
20 requirement, courts have applied a three-part test. Johnson, 2 F.3d
21 at 921; Kaiser, 347 F.3d at 1115. Essentially, the test requires that
22 "[t]he claim must be (1) collateral to a substantive claim of
23 entitlement (collaterality), (2) colorable in its showing that denial
24 of relief will cause irreparable harm (irreparability), and (3) one
25 whose resolution would not serve the purpose of exhaustion
26 (futility).'" Kaiser, 347 F.3d at 1115 (quoting Johnson, 2 F.3d at
27 921). Here, grounds do not exist to judicially waive the administra-
28 tive remedies exhaustion requirement. Specifically, plaintiff's

1 claims are not "collateral to a substantive claim of entitlement," but
2 are directed at his substantive claim. Kildare, 325 F.3d at 1082-83;
3 Bass, 872 F.2d at 833. Moreover, "administrative proceedings would
4 not be futile for [plaintiff's] claim but would be necessary in order
5 to establish a detailed factual record and permit the agency to apply
6 its expertise." Bass, 872 F.2d at 833; Kildare, 325 F.3d at 1084.
7 Since plaintiff has not exhausted his administrative remedies
8 regarding the overpayment and its recoupment, this Court lacks subject
9 matter jurisdiction over plaintiff's challenge of the recoupment of
10 the SSI overpayment.⁷ Bass, 872 F.2d at 833; Hironymous v. Bowen, 800
11 F.2d 888, 894 (9th Cir. 1986).

12 13 II

14 To the extent plaintiff's complaint raises a tort claim for fraud
15 or negligence, it is governed by the Federal Tort Claims Act ("the
16 FTCA"), 28 U.S.C. §§ 2671-80. Under the FTCA, only the United States
17 is a proper defendant; neither SSA nor Breen are proper defendants.

18
19 ⁷ In his amended opposition to the motion to dismiss,
20 plaintiff claims that despite his failure to exhaust his
21 administrative remedies, he can maintain a procedural due process
22 claim that his retirement benefits were terminated without notice
23 or an opportunity to be heard. See Amended Opposition at 4:6-
24 5:11. However, there are no facts supporting this argument.
25 Rather, plaintiff was provided notice that his Title II retire-
26 ment benefits would be withheld -- not terminated -- and informed
27 how he might challenge that decision, and plaintiff timely sought
28 reconsideration of that determination; however, plaintiff did not
wait for SSA's ruling on his request for reconsideration before
filing in this district court. In any event, plaintiff "ha[s]
not been deprived of procedural due process until [he has]
exhausted [his] administrative remedies because only then can
[this Court] determine whether [plaintiff was] deprived of
adequate process." Kildare, 325 F.3d at 1085.

1 Kennedy v. United States Postal Serv., 145 F.3d 1077, 1078 (9th Cir.
 2 1998) (per curiam); Lance v. United States, 70 F.3d 1093, 1095 (9th
 3 Cir. 1995) (per curiam); see also Federal Deposit Ins. Corp. v. Craft,
 4 157 F.3d 697, 706 (9th Cir. 1998) ("The FTCA is the exclusive remedy
 5 for tortious conduct by the United States, and it only allows claims
 6 against the United States. Although such claims can arise from the
 7 acts or omissions of United States agencies . . . , an agency itself
 8 cannot be sued under the FTCA."). Moreover, and more importantly,
 9 plaintiff cannot maintain a tort action against the United States
 10 based on the improper withholding of Social Security benefits. 42
 11 U.S.C. § 405(h); Hooker v. United States Dep't of Health & Human
 12 Servs., 858 F.2d 525, 529-30 (9th Cir. 1988). Finally, plaintiff
 13 cannot maintain an FTCA claim since he did not exhaust his tort claim
 14 administrative remedies.⁸ McNeil v. United States, 508 U.S. 106, 113,
 15 113 S. Ct. 1980, 1984, 124 L. Ed. 2d 21 (1993); Sameena, Inc. v.
 16 United States Air Force, 147 F.3d 1148, 1152 (9th Cir. 1998).

17
 18 To the extent plaintiff's complaint raises a civil rights or
 19 *Bivens*⁹ action, it cannot be brought against an agency of the United
 20 States, such as the Social Security Administration, Federal Deposit
 21 Ins. Corp. v. Meyer, 510 U.S. 471, 483-86, 114 S. Ct. 996, 1004-06,
 22 127 L. Ed. 2d 308 (1994); Bruns v. National Credit Union Admin., 122
 23 F.3d 1251, 1255 (9th Cir. 1997), or against defendant Breen in his
 24 individual capacity. Schweiker v. Chilicky, 487 U.S. 412, 429, 108
 25 //

26
 27 ⁸ See Declaration of John A. Carlo, ¶ 3.

28 ⁹ Bivens v. Six Unknown Named Agents of Fed. Bureau of
Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

1 S. Ct. 2460, 2470-71, 101 L. Ed. 2d 370 (1988); Butler v. Apfel, 144
2 F.3d 622, 624 (9th Cir. 1998) (per curiam); Hooker, 858 F.2d at 530.

3
4 **ORDER**

5 The defendant's motion to dismiss for lack of subject matter
6 jurisdiction IS GRANTED, and Judgment shall be entered accordingly.

7
8
9 DATE: December 8, 2006

/s/ Rosalyn M. Chapman
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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